

ESTTA Tracking number: **ESTTA943619**

Filing date: **12/22/2018**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

| | |
|---------------------------|---|
| Proceeding | 91233690 |
| Party | Defendant Rusty Ralph Lemorande |
| Correspondence Address | RUSTY LEMORANDE 1245 NORTH CRESCENT HEIGHTS BLVD #B LOS ANGELES, CA 90046 UNITED STATES lemorande@gmail.com 323-309-6146 |
| Submission | Other Motions/Papers |
| Filer's Name | Rusty Ralph H Lemorande |
| Filer's email | lemorande@gmail.com |
| Signature | /Rusty Ralph H Lemorande/ |
| Date | 12/22/2018 |
| Attachments | NOLD.SURREBUTAL.MOTION FOR SANCTIONS.SEND.pdf(435733 bytes) |

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE
THE TRADEMARK TRIAL AND APPEAL BOARD**

Serial No: 87090468
Publication date: 11/29/2016
Opposition Number: 91233690
For the Mark: NIGHT OF THE LIVING DEAD

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| <hr/> |) | |
| Rusty Lemorande <i>in pro per</i> |) | |
| |) | |
| Petitioner, |) | |
| |) | |
| v. |) | |
| |) | |
| IMAGE 10, INC. |) | |
| |) | |
| Respondent. |) | |
| <hr/> |) | |

**APPLICANT'S SURREBUTAL TO OPPOSER'S REPLY TO APPLICANT'S
MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SANCTIONS FOR
OPPOSER'S FAILURE TO PROVIDE DISCOVERY AS REQUESTED AND
ORDERED,
PURSUANT TO 37 CFR § 2. 120 (g).**

Now comes the Applicant, Rusty Lemorande, providing surrebutal to Opposer's Reply to Applicant's request for an Order dismissing the pending Opposition as a result of Opposer's failure to provide documents requested after various inquiries, three Motions to Compel, and two Orders by the TTAB (the Board).

GENERAL

Attorney for counsel has, once again, confounded and complicated this matter causing unnecessary prejudices and delays.

As previously briefed, Applicant attempted to meet and confer, specifically by telephone as the TTAB required, to discuss the outstanding document production issues in an attempt to

resolve the matter without the need to contact the TTAB for an conference call, or subsequently file an additional motion, time consuming for all.

As previously briefed, after several attempts to engage in such a call (burning through more days) counsel for Opposer declared that counsel was no longer representing Opposer and, therefore, no more communication on the matter would be had, effectively, once again, causing delays in the matter, including forestalling the proper, intended business operations of Applicant, operations which require resolution of Opposer's opposition to Applicant's good faith and bona fide trademark application.

Counsel stated he would file his withdrawal within two business days.

What resulted has also been already briefed – in short, this did not occur. What should be noted now is that counsel has just informed Defendant that he is still representing Opposer (evidenced by the brief recently filed and by a recent email in response to Applicant's inquiry. See Exhibit 1).

This is not only confusing but once again, either by non-excusable negligence or a specious, intentional tactic to delay, has further prejudiced applicant and cost the TTAB more of its precious, limited resources. In short, counsel, given its position as counsel, then and now, should have engaged in the required telephone conference, and then, if necessary, engaged in a three way conference with the parties and TTAB precluding any need for further motion practice, and certainly avoiding another three month delay (at least) in this already two-year process, still without one document produced and numerous motions.

Therefore, the pending requests for sanctions is even more appropriate.

Opposer, despite knowing it has no basis for use of the trademark given the presumption in favor of Applicant whose application was duly examined by the USPTO and approved for publication, has recently attempted to use the mark in commerce to the possible great detriment

both to the Applicant and the public which will have been deceived, once the opposition is resolved. (See Exhibit 2, as an example of the prospective film listing, and Exhibit 3 showing the affiliation of the Exhibit 2 film production to Image 10. Highlights added in both.)

REGARDING ALLEGATION THAT APPLICANT'S MOTION IS UNTIMELY

Opposer, in its reply, also states that Applicant's request for sanctions is inappropriate given the pending Motion to Compel. As Applicant stated in its Motion for Sanctions, Applicant believes that supplement motion is germane and, therefore, appropriate. In other words, the two are interlinked.

However, Applicant also requested that if this position was incorrect, that the TTAB kindly dismiss without prejudice.

OPPOSER'S CONFUSING ASSERTION REGARDING INTERROGATORIES

Finally, Opposer admits in its Replay that, after several orders from the TTAB, it has not produced a single document, somehow declaring its responses to interrogatories are positive evidence in its favor.

ATTEMPTS TO RESOLVE

Petitioner has attempted to resolve these discovery matters cordially and professionally over the past two years. As of this date, there has been no resolution or apparent good -faith effort towards resolution. It has therefore become clear that these disputes cannot be resolved between the parties.

CERTIFICATION OF GOOD FAITH EFFORT TO RESOLVE DISPUTE

In accordance with Trademark Rule 2.120(e), Petitioner hereby certifies that he has made a good faith effort to resolve the issues presented in this motion. (*See Exhibits A and B.*)

CONCLUSION

WHEREFORE, Applicant prays that the Board, pursuant to 37 CFR § 120 (g) (1) and Fed. R. Civ. P. 37 (b) (2) (C) dismiss this Opposition with prejudice for willful and continuing failure to comply with the rules governing discovery, and specifically with the Board's prior orders, or, in the alternative, order lesser sanctions as described in Rule 37(b)(2) of the Federal Rules of Civil Procedure.

Respectfully submitted,

/R. H. Lemorande/

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Los Angeles, CA 90046

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Telephone: (323) 309 6146

Applicant In Pro Per

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading was sent via First Class Mail this 22nd day of December, 2018, to Opposer, Image 10 at 216 Euclid Avenue Glassport, PA 15045, and also via email to Michael Meeks and Farah Bharatti at mmeeks@buchalter.com, and fbhatti@buchalter.com, respectively, counsel to Image 10, Opposer.



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For the Mark: NIGHT OF THE LIVING DEAD

R.H. Lemorande <lemorande@gmail.com>

Opposition to Moiton for Default

Meeks, Michael L. <mmeeks@buchalter.com>
To: "R.H. Lemorande" <lemorande@gmail.com>

Tue, Dec 11, 2018 at 3:12 PM

We are counsel until relieved by the TTAB. But new counsel will be substituting in shortly.

Sent from my iPhone

On Dec 11, 2018, at 1:09 PM, R.H. Lemorande <lemorande@gmail.com> wrote:

Thank you.

Are you counsel for Image 10 again?

On Tue, Dec 11, 2018 at 11:19 AM Meeks, Michael L. <mmeeks@buchalter.com> wrote:

Filed today.

Michael Meeks

Buchalter

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Night of the Living Dead Part II (2019)

ShareVisit on IMDb

Horror

Plot under wraps.

WritersRudy Ricci (story) | John A. Russo (story) | Russell Streiner (story)

ProducersSteve J. Scarduzio | Steve Wolsh

See all filmmakers & crew (26)

Trending

MOVIEmeter129,469

Status

Pre-ProdUpdated Nov 3, 2018

Edit

Track

Add to list

Contacts

+ Add

Production Company

Living Dead Media

nightofthelivingdead.com

PO Box 251802
Los Angeles, CA 90025
USA

See map (bing.com)

See all company credits (2)

| Cast | Filmmakers | Images | Videos | Details | Box Office | Companies | News |
|---|------------|--------|--------|---------|------------|---|------|
| Companies | | | | | | | |
| 2 companies | | | | | | | |
| Production Companies (2) | | | | | | Contact | |
| Living Dead Media [US] – Production company | | | | | | nightofthelivingdead.com | |
| Branch: Los Angeles, CA | | | | | | | |
| WithAnO Productions [US] – Production company | | | | | | withanoproductions.com | |
| Branch: Los Angeles, CA | | | | | | stevevolsh.assistant@withanopr oductions.com | |

MOVIEmeter

129,469 Up 1,749 this week

3 monthsAll

Ratings Breakdown

Release date not announced

IMDb users will be able to rate this title after it has been released

+ Add external reviews



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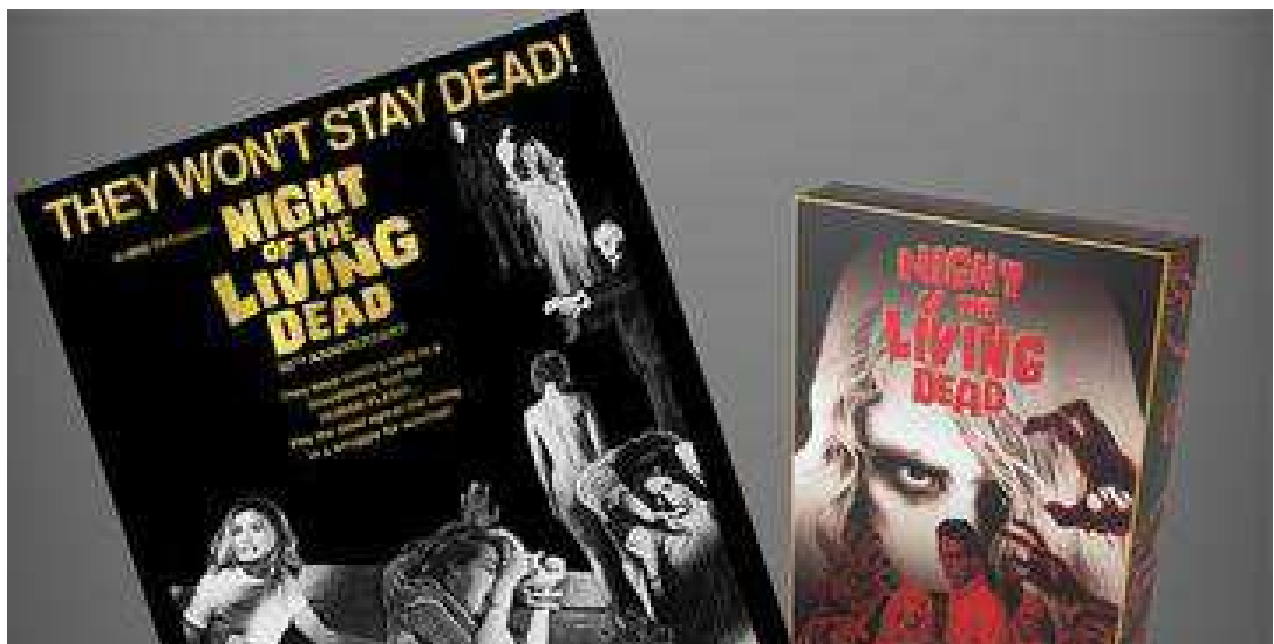
EXHIBIT THREE



Night of the Living Dead Collector's Box



FEATURED COLLECTION



BloodBath and Beyond Collector's Box Unboxing Video

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